

# Michigan Law Review

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Volume 41 | Issue 1

---

1942

## INSURANCE - INSURABLE INTEREST - TENANT AT WILL

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### Recommended Citation

Robert D. Ulrich, *INSURANCE - INSURABLE INTEREST - TENANT AT WILL*, 41 MICH. L. REV. 175 (1942).  
Available at: <https://repository.law.umich.edu/mlr/vol41/iss1/18>

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INSURANCE — INSURABLE INTEREST — TENANT AT WILL — Plaintiff, an unincorporated religious association, brought this action to recover on a fire insurance policy. Evidence was introduced from which the jury could find that the plaintiff had occupied and used the premises as a church for sixteen years before the policy was issued, but during this period title stood in the name of an incorporated church society. After the date of the policy, but prior to the loss, title was conveyed to the plaintiff. Defendant insurer appeals from judgment for the plaintiff on the ground that plaintiff had no insurable interest on the date of the policy. *Held*, the evidence warranted the inference that there was an affiliation between titleholder and occupant, which gave the occupant a prospect approaching assurance that its possession would be allowed to continue. This prospect had a value capable of measurement in money terms, and was an insurable interest. *Womble v. Dubuque Fire & Marine Ins. Co.*, (Mass. 1941) 37 N. E. (2d) 263.

The Massachusetts court expressly subscribes to the generally accepted rule that if the insured had no insurable interest in the property when the policy by its terms would become operative, the policy is invalid, and subsequent acquisition of an insurable interest prior to loss will not validate the policy.<sup>1</sup> To recover, the insured must also have an insurable interest at the time of loss.<sup>2</sup> The reasons commonly announced for the requirement that the insured have an insurable interest both at the time the risk was intended to attach and at the

<sup>1</sup> 29 AM. JUR. 295 (1940); 1 COUCH, CYCLOPEDIA OF INSURANCE LAW 800 (1929).

<sup>2</sup> *Id.*

time of loss are that otherwise the contract is one of wager,<sup>3</sup> and that a contrary rule would invite the unscrupulous to insure, with an intent to destroy the property.<sup>4</sup> This latter objection seems based on the belief that although the fire insurance policy is one of indemnity,<sup>5</sup> as a practical matter the insured will think his recovery in case of total loss will be the face amount of the policy, and thus have an incentive to destroy the property. In the principal case the only interest the insured had at the date when the policy issued was mere occupancy with the expectation that it would be continued.<sup>6</sup> An insurable interest has been found when the assured was a mortgagee,<sup>7</sup> the holder of an option to buy,<sup>8</sup> a lessor,<sup>9</sup> a remainderman,<sup>10</sup> one in possession with the expectation of being deeded the property,<sup>11</sup> an heir expectant placed in possession by the owner with a promise of devise,<sup>12</sup> or a lessee.<sup>13</sup> Normally, in the case of the mortgagee, the holder of

<sup>3</sup> *Id.* 772 ff. (1929). At page 775 of that work, it is suggested that the test of validity is whether the contract was intended as a mere wager or was intended as an indemnity for an actual insurable interest. It would be difficult to say that the instant policy was intended as a mere wager. No recent cases were discovered expressly holding there was no insurable interest because the contract was one of wager. If the other reason of preventing the destruction of property is satisfied, apparently that of wager is satisfied.

<sup>4</sup> 1 COUCH, *CYCLOPEDIA OF INSURANCE LAW* 777 (1929).

<sup>5</sup> The policy of fire insurance is one of indemnity unless otherwise stipulated. The insured is entitled to recover only his actual loss not exceeding the agreed sum. 29 AM. JUR. 48 (1940). Where, however, the insured is not the full owner of the property, it is difficult to determine exactly the loss. In *Liverpool & London & Globe Ins. Co. v. Bolling*, 176 Va. 182, 10 S. E. (2d) 518 (1940), the insured, who had possession plus the expectancy of being deeded the property, was given the face amount of the policy. In the instant case, the plaintiff was awarded \$2,052 below; the face amount of the policy does not appear in the report.

<sup>6</sup> The principal case, 37 N. E. (2d) 263 at 265, quotes the following rule from *Eastern R. R. v. Relief Fire Ins. Co.*, 98 Mass. 420 at 423 (1868): "By the law of insurance, any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself." Although this statement is often found in reports and texts, no decisions were found applying it to a trespasser or licensee in possession.

<sup>7</sup> *Columbian Ins. Co. v. Lawrence*, 2 Pet. (27 U. S.) 25 (1829). No case was found in which this question has recently been in issue; a number of courts clearly accept it as the law. See 29 AM. JUR. 303, note 16 (1940) for citation of authorities.

<sup>8</sup> *Crossman v. American Ins. Co.*, 198 Mich. 304, 164 N. W. 428 (1917); *L. R. A.* 1918A 390.

<sup>9</sup> *Ely v. Ely*, 80 Ill. 532 (1875); *Hale v. Simmons*, 200 Ark. 556, 139 S. W. (2d) 696 (1940).

<sup>10</sup> *Webster v. Hanover Fire Ins. Co.*, 19 Pa. Dist. 369 (1909); *McCracken v. McCracken*, 24 Pa. D. & C. 367 (1935).

<sup>11</sup> *Liverpool & London & Globe Ins. Co. v. Bolling*, 176 Va. 182, 10 S. E. (2d) 518 (1940).

<sup>12</sup> *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45 N. E. 1078 (1897).

<sup>13</sup> *Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co.*, 109 Me. 274, 83 A. 801 (1912), for life of another; *Home Ins. Co. v. Coker*, 43 Okla. 331, 142 P. 1195 (1914); *Miller v. Gold Beach Packing Co.*, 131 Ore. 302, 282 P. 764 (1929);

an option to buy, the lessor, and the remainderman, the insured is out of possession, and there is less opportunity for him to destroy the property. When the insured is in possession with the expectation of having the property conveyed to him, and when he is an heir expectant placed in possession with a promise of devise by the owner, the incentive to destroy the property is no greater than if he were owner in fee, as the chance of obtaining a windfall gain is equally slight in both cases. In the light of these cases, the instant holding would seem to expose the definition of insurable interest. However, there would seem to be no policy reasons for permitting a lessee to recover and denying this to plaintiff, since the lessee's opportunity to destroy the property is as great as that of the instant insured, and unlike the titleholder or expectant titleholder in possession, the lessee's expected recovery would be largely windfall. Since the rule as to lessees does not satisfy the argument that one should have an insurable interest so that he will not be tempted to destroy the property, it is doubtful whether it should be extended to allow a mere occupant to recover. The principal case, however, is distinguishable from one in which the interest of the insured both on the date of the policy and at the time of loss was mere occupancy with the expectation that it would be allowed to continue, for here the occupant had acquired title prior to the date of loss. If the insured has title at the date of loss, the property destruction argument is of little weight, and a court may be justified in ruling liberally so as to find an insurable interest on the date of the policy as required by the generally accepted rule, which the court in the principal case expressly follows.<sup>14</sup>

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Philadelphia Tool Co. v. British-America Assur. Co., 132 Pa. 236, 19 A. 77 (1890); 42 L. R. A. (N. S.) 135 (1913); ANN. CAS. 1913E 741; ANN. CAS. 1917C 951.

<sup>14</sup> Judiciously, the court says, "The requirement of an insurable interest when the risk is assumed arose merely to prevent the use of insurance for illegitimate purposes. It should not be extended beyond the reasons for it by excessively technical construction." 37 N. E. (2d) 263 at 266. Had the court stated as a rule that if an insurable interest satisfying the property destruction argument exists at the time of loss, it would not inquire into a finding of an insurable interest on the date the policy by its terms was to have become operative, it would have opened the door to abuses. Insurance companies might have been tempted to sell insurance indiscriminately to mere occupants of property knowing that if the insured did not later acquire a greater interest, they would have a defense to his action. As a practical matter, the insured cannot be presumed to know the law, and having bought insurance, he would think he could recover the face amount of the policy for fire damage resulting in total loss. This would work a hardship on those who insured in good faith, and would be just as much an invitation for the unscrupulous to destroy the property.